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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of San Diego Gas & Electric Company (U 902 E) for a Certificate of Public Convenience and Necessity for the Sunrise Powerlink Transmission Project.

Application 06-08-010
(Filed August 4, 2006)

Application 05-12-014
(Filed December 14, 2005)

Administrative Law Judge's Ruling on the Motion of the San Diego Gas & Electric Company to File Under Seal and For a Protective Order

In a motion filed August 4, 2006, the San Diego Gas & Electric Company (SDG&E) requests a ruling: (1) granting leave to submit under seal certain portions of Volume 2 of its application, and (2) adopting a protective order to govern access to and use by intervenors of protected information that may subsequently be produced by SDG&E, and by other parties in this proceeding. With respect to the material filed under seal, the motion seeks to protect a small amount of confidential information in its application concerning Renewable Portfolio Standard contracts that are currently in negotiation, or are part of SDG&E's 2005 and 2006 Renewable Portfolio Standard Request for Offers. SDG&E argues that the redacted matter is confidential procurement information protected generally by Pub. Util. Code § 454(g), and specifically by the Investor Owned Utility ("IOU") Matrix attached to D.06-06-066 as Appendix 1.¹

¹ The appendix is available for view at http://www.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/57774.htm.

SDG&E seeks to protect 12 items in Chapter III of Volume 2 of the application related to its renewable power procurement effort. In addition, SDG&E seeks to protect one four-page table in Appendix V of the Application containing detailed cost estimates for the project on grounds that access to such proprietary estimates could give an advantage to contractors formulating bids for project work or equipment.

SDG&E served all parties with a copy of its application from which it redacted all of the items at issue in the ruling. Concurrent with the motion, SDG&E filed the unredacted version of Volume 2 with the Commission. SDG&E also seeks approval of a proposed protective order and non-disclosure certificate governing access to and the use of confidential information in the proceeding. The utility states that the proposed protective order is based on one of the model orders under consideration in Phase 2 of R.05-06-040, modified to include protection of construction cost information, as discussed in Section III of the motion.

At the September 13, 2006 prehearing conference, I directed SDG&E to supplement its motion with a log that sets forth the items that fit within the request, and the information required to accompany such motions by Ordering Paragraphs 2 and 13 of D.06-06-066. I also directed SDG&E to address how its motion, as it relates to the renewable power procurement materials, satisfies the language in the executive summary of that decision stating that “information related to renewable energy procurement must meet a higher burden in order to be protected.”

In response, on September 25, 2006, SDG&E provided the following log of the items that it is seeking to protect:

SDG&E Log and Requested Information Related to Matrix in D.06-06-066

Location Page and Line	Description	IOU Matrix Item
III-3, line 9	2005 RFO (Request for Information) wind offer quantity	VIII.A
III-3, Lines 22-23 (two items)	2005 RFO pending negotiations – counter-party location and total quantity	VIII.A
III-6, n.6	2005 RFO short-list off quantity by type	VIII.A.
III-11, lines 16-17, 199 and nn.13-14 (five items)	SES contract incremental delivery schedules	VII.F.
III-12, line 1	SES contract incremental delivery schedule	VII.F.
III-1, lines 7-8	Esmeralda contract site information	VII.F.
III-12, line 19	2005 RFO negotiations – quantity and resource type	VIII.A.
Appendix V	Project detailed capital cost estimate breakdown	N/A

The information that SDG&E seeks to protect is of three different types:

- (1) bid-related information for renewable energy projects that are not yet under contract,
- (2) information from existing renewable energy contracts, and
- (3) detailed Sunrise project cost estimates.

The Commission addressed the first two types of information in the investor-owned utility matrix attached to D.06-06-066. As indicated in the matrix, the Commission expressly allows utilities to protect information concerning pending bids (Section VIII.A.), and expressly allows for public release of information concerning existing contracts (Section VII.F.). SDG&E argues that the matrix speaks for itself in terms of the special burden attached to protecting information related to renewable power procurement. Thus, I grant the motion as it pertains to the items with the VIII.A. designation in the last column. I deny

the motion as it pertains to the items with the VII.F. designation in the last column because D.06-06-066 expressly allows for release of such information.

SDG&E asks to protect its detailed cost estimates by arguing that if potential project bidders viewed the estimates, they would treat them as a floor, and demand a greater amount. There is little logical support for this concern. It appears equally likely that potential bidders would assume they would need to beat the estimated price in order to secure a contract. This might result in a problem only if SDG&E systematically over-estimated the project cost. Regardless, if the contracts were subject to a competitive bidding process, bidders would be competing not against SDG&E's price estimates, but against each other. Perhaps more significantly, other utility applicants in recent transmission line proceedings have released detailed cost estimates for public scrutiny, and SDG&E has not offered a reason that its circumstances are different. For all of these reasons, I deny this portion of SDG&E's motion.

LS Power Generation objects to the following specific nondisclosure provision in SDG&E's proposed protective order:

[F]or a period of two (2) years from the date a Disclosing Party provides Protected Materials to a Reviewing Representative, such Reviewing Representative shall not engage, directly or indirectly, in (a) the purchase, sale, or marketing of electrical energy or capacity or natural gas (or the direct supervision of any employee(s) whose duties include such activities), (b) the bidding on or purchasing of power plans (or the direct supervision of any employee(s) whose duties include such activities), or (c) consulting with or advising others in connection with any activity set forth in subdivisions (a) or (b) above (or the direct supervision of any employee(s) whose duties include such activities or consulting), if such activities (as described in subparagraphs (a) through (c) are reasonably likely to affect California energy markets in more than a de minimis way.

LS Power Generation argues that for parties that are unable to maintain a team of in-house attorneys and experts, this provision is particularly onerous, since outside experts could only participate in a protected portion of a given proceeding at the risk of being precluded from normal employment during the following two years. LS Power Generation further argues that the problems with this restriction are magnified by the vagueness of the proposed language. How would any outside reviewing representative determine whether a response to a client's seemingly innocuous question would be used in connection with the purchase, sale, or marketing of electrical energy or capacity or natural gas? How would he or she then determine whether the client's use of that answer would have more than a de minimis effect on California energy markets? How would the reviewing representative know if his or her advice was indirectly used for the listed activities? LS Power Generation suggests that anyone making a good faith effort to comply with such an order would have to err on the side of not discussing energy-related matters with clients, for fear that an apparently innocent answer would be used in a manner that violates the order.

In the proceeding from which SDG&E derives its proposed language (R.05-06-040), the Commission is considering adopting a model protective order. LS Power Generation proposes that the Commission direct SDG&E to use a Model Nondisclosure and Protective Agreement proposed by The Utility Reform Network ("TURN") in the same docket. LS Power argues that adopting TURN's proposed Model Nondisclosure and Protective Agreement or a similar agreement as an interim measure until the Commission rules on a model protective order in R.05-06-040 would allow this case to proceed without putting outside counsel and experts in the untenable position of having to choose between withdrawing from representing their client's interests in this case and

forgoing employment for the next two years. SDG&E has not responded to this proposal.

The challenge with the language proposed by SDG&E is that it is overly broad. Rather than focusing on the use of the protected language, it proscribes, for a two-year period, activities that may be unrelated to and unaffected by the protected information. A recipient of protected information should be forbidden from misusing the information, rather than unnecessarily restricted in his or her future career choices. We will allow SDG&E to use TURN's proposed model agreement as submitted in R.05-06-040, but not use the proposed agreement attached to its motion in this proceeding.

SDG&E shall revise its redacted filing to exclude only the information concerning pending renewable energy bids, described above.

IT IS SO RULED.

Dated October 31, 2006 at San Francisco, California.

/s/ STEVEN WEISSMAN

Steven Weissman
Administrative Law Judge

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the filed document is current as of today's date.

Dated October 31, 2006, at San Francisco, California.

/s/ DAVID NG

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